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purchaser of the tenure certain rights: see *Pran Bandhu Sirkar* v. *Sarba Sundari Debi* (1) and *Ram Baksh Chatlangi* v. *Hridoy Mani Debi* (2).

(1) 3 B. L. R., A. C., 52.

(2) *Before Mr. Justice Phear and Mr. Justice Hobhouse.*

The 11th December 1868.

RAM BAKSH CHATLANGI AND ANOTHER (PLANTIFFS) *v.* HRIDOY MANI DEBI, MOTHER AND GUARDIAN OF BOIDONATH MOOKERJEE (DEFENDANT.)*

Baboo *Bhawani Charan Dutt* for the appellents.

Baboos *Srinath Das* and *Bhaggabatti Charan Ghose* for the respondent.

The judgment was delivered by

PHEAR, J.—The plaint sets out the facts of this case very clearly and concisely. The plaintiff purchased a certain jote jumma at an auction-sale, and obtained possession of it on the 6th April 1866. This sale was held in execution of a decree against the defendant in this suit who was at that time the possessor of the tenure. The plaintiff, as we have said, obtained possession after his purchase; and while he was so in possession, Rakhal Das Mookerjee the patnidar under whom this jote was held, instituted a suit in the Collector's Court against the defendant to recover arrears of rent in respect of this jote jumma which had become due during the time of the possession of the defendant and before the purchase of the plaintiff. In execution of the decree which the patnidar obtained in the Collector's Court, this jote jumma then held by the plaintiff was attached, and an order was passed by that Court directing that it should be sold. At that stage of the proceedings, the plaintiff, in order to protect, as he supposed, his right to the tenure and to save it from sale, paid the amount of the decree against the defendant, and he now seeks in the present suit to recover the amount which he so paid as being money paid on behalf of the defendant.

The only question before us is, whether the payment which he made under the circumstances that we have mentioned was such as entitled him to claim to be reimbursed the money by the defendant. We think that this payment was a voluntary payment. Had the present suit been brought against the patnidar who, by the proceedings taken in the Collector's Court, did bring about the result that the plaintiff considered himself coerced into paying this money, the case might have been different. It might then have been that the patnidar could not have resisted the plaintiff's claim merely on the allegation that the money need not have been originally paid by the plaintiff.

But in the case before us, we think that the defendant is quite entitled to rely upon the actual facts, of the case; and under these circumstances, according to a judgment which has lately been delivered by this Bench, there was no legal necessity rendering it incumbent upon the plaintiff to pay the amount of the decree which the patnidar had obtained against the defendant. Had the sale been proceeded with in the Collector's Court, nothing could have passed by it. The plaintiff would have been no way damaged in his proprietary rights. It is true that he might have been inconvenienced by the occurrence of such a sale; but we think that mere inconvenience without risk of any actual damage is not enough to take away the voluntary character of the payment which he made. In this view, we think that the plaintiff's suit ought to be dismissed, and as the lower Appellate Court has in fact dismissed it, although the Subordinate Judge appears to have been governed in his decision by reasons

* Special Appeal, No. 2192 of 1868, from a decree of the Subordinate Judge of Nuddea, dated the 30th May 1868, reversing a decree of the Sudder Ameen of that district, dated the 7th March 1868.

Mr. *Gregory* replied.

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JACKSON, J.—It seems to me that this is a very clear case, although it has been argued at very great length, occupying the whole day. The suit was brought to obtain possession of a share of a tenure, which the plaintiff alleged she had inherited from her mother, who had purchased it from the former proprietor Braja Mohan Deb. The plaintiff alleged that for the last 13 or 15 years her mother and subsequently she and her sister had been in possession of this tenure. At the close of 15 years a suit was brought on the part of the zemindar for arrears of rent, not against the then occupants of the tenure but against Braja Mohan, who had originally sold the tenure to the plaintiff's mother. An *ex parte* decree was obtained and in execution of that decree the tenure was put up to sale and was purchased by the special appellant in this case. The plaintiff alleged that the whole of these proceedings were fraudulent. We have been told that she did not allege fraud, but it is impossible, we think, to read the plaint without being satisfied that the plaintiff did allege deliberate fraud. It is true that the word fraud is not used, but it is said that the zemindar's agent and the zemindar himself knew perfectly well that Braja Mohan had no longer any connection with the tenure and still deliberately brought the suit against him, and, in the absence of the real owner obtained an *ex parte* decree, and without properly issuing any sale proclamation put this tenure up to sale.

The point taken by the special appellant, who is the purchaser at the auction sale, is that the plaintff was not the registered tenant; that the plaintiff, though she had been for fifteen years in possession, had never got her mother's name or her own name rigistered in the zemindar's sherista in the place of Braja Mohan; and it is alleged that under these circumstances the zemindar was quite right to bring his suit for rent against the registered tenant, totally regardless of who was the real tenant. And it was strongly pressed that even if the zemindar was in fraud, still there was nothing whatever to show that the

different from those which we have just now been explaining, we are of opinion that the decree of the lower Appellate Court was right, and ought not be disturbed upon special appeal. Accordingly, we dismiss this appeal with costs.

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purchaser was in any way concerned in that fraud; and he being an innocent purchaser and having parted with his money, was entitled to the tenure, the more so as the purchase was effected in execution of a decree under section 105, Act X of 1859.

The case first came before the Subordinate Judge, Mr. Hutchinson, who did not raise all the issues arising out of the statements filed by the parties, and who omitted to try the most important issue in the case,—namely, the fraud, which was alleged against the decree-holder and the purchaser. The result of the omission is that no evidence has been given as regards the fraud, and the case has been decided upon other points. Mr. Hutchinson dismissed the plaintiff's suit without making any enquiry into this fraud; even though he seemed to have been satisfied that the plaintiff's mother had purchased the property from Braja Mohan, and that the plaintiff's mother and the plaintiff had been in possession for many years, still, because they had not registered their names, he was of opinion that the decree under the Act X suit was legal, and that the sale should be upheld.

The Judge on appeal has very properly scouted any such idea. The Judge has found that the zemindar was aware of the fact of the purchase by the plaintiff's mother; that the plaintiff was his own niece, and that it was quite impossible to believe that the zemindars knew nothing about their possession for fifteen years of this tenure. The Judge has found that the plaintiff's possession has been clearly proved by a large quantity of evidence, that she has been treating this tenure for fifteen years as her own and giving it out in ijara in some years; and, although the name of Braja Mohan seems to have been on the register, the Judge is of opinion that looking to these facts the plaintiff is entitled to recover the tenure, as no notice was given to her of the suit, and as her tenure could not be sold under a decree obtained against a third party.

On special appeal to this Court, the first argument was in connection apparently with the case of *Jan Ali* v. *Jan Ali Chowdhry* (1); that as long as there was a decree under Act X

(1) 1 B. L. R., A. C., 56.

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of 1859 and the property was sold in execution of that decree, no matter in what way the decree was brought about, still an innocent purchaser purchasing the tenure under section 105, Act X of 1859, ignorant of any fraud on the part of the decree-holder, is entitled to keep that property as against the previous owner of the tenure. It seems to me, that to admit any such argument would be opening at once the widest door to fraud and chicanery all over the country. No person's tenure or property would be safe. A decree might be obtained for it in the owner's absence against a third party who has no connection with it, and in execution of that decree, if a sale takes place, the purchaser has a prior title over the property to that of the real owner. The precedent quoted certainly does not lay this down to be the law.

One question before us is whether it is necessary to remand this case for an enquiry into the fraud, because it is said that evidence can be produced of the fraud of both purchaser and decree-holder. We are of opinion that the Judge has put this case on very proper ground, namely that wholly regardless of the fraud, the suit not having been brought against the real tenant and the decree not having been against the tenant, the sale cannot be upheld. There are several precedents of this Court which were quoted by Baboo Ramesh Chandra Mitter, to the effect that under Act X of 1859 there is no authority in the Revenue Court to put up to sale in execution of decree any property except the property of the judgment-debtor, and if property which is not the property of the judgment-debtor, be sold in execution of a decree against that judgment-debtor such sale is invalid. It has been several times repeated in the course of the argument that we are dealing here with what is called an innocent purchaser. When we look to the facts of this case as between the present plaintiff on the one side and the innocent purchaser (defendant) on the other side, we see that the plaintiff for no fault of her own has been deprived of an estate which is worth a thousand rupees, for which her family paid full consideration. The loss to her would be most severe if we sustained the sale. But, on the other hand, if the

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defendant's purchase is held to be invalid he loses nothing ; he is in no way injured ; except that he does not gain a property worth a thousand rupees on payment of 180 rupees. Then as between these two parties in which way should the Court in honesty and equity decide ? Are we to deprive the plaintiff of an estate worth a thousand rupees in order to give it to the innocent purchaser who has bought it for a song. The whole case really amounts to this. The plaintiff is certainly as innocent and blameless as the present defendant. It seems to me that it would be the grossest injustice to deprive the plaintiff of her estate. It is matter of regret that the whole question of fraud has not been gone into, as there are many suspicious circumstances in it, but as the case stands at present we are satisfied that the plaintiff is entitled to the decree which the Judge has given her.

The appeal is dismissed with costs.

MOOKERJEE, J.—I am also of opinion that this appeal should be disallowed.

The finding of the Court below is to the effect that the plaintiff has abundantly proved that her mother purchased the Talook from Braja Mohan Deb, in the Tipperah year 1269 which is equal to 1266 B. S. (1859) ; that both the mother and the plaintiff were in possession of the Talook, and had all along paid the rent of it to the Maharaja of Tipperah who is the zemindar, and that the Maharajah had recognized the plaintiff as his tenant by purchase from Braja Mohan.

The question therefore for determination is whether under this finding of fact the law applied by the Judge is correct, and whether we should disturb the decree passed by him in favor of the plaintiff.

If the Maharaja knew that Braja Mohan had sold his right in the tenure to the plaintiff's mother, and if the Maharaja had recognized the plaintiff as his tenant, he was assuredly wrong in instituting the rent suit against the old tenant Braja Mohan, and he must be held to have undoubtedly acted in bad faith in selling the tenure as the tenure of Braja Mohan, in execution of the decree which he had thus improperly obtained.

I do not think that under the circumstances of this case it was necessary to allege, or distinctly to prove, any particular act of fraud, either on the part of the zemindar or of the purchaser. Fraud has however been distinctly alleged and proved against at least the zemindar. The substance of the plaint is this, that the zemindar and his agents were fully cognizant of the fact of the purchase and possession of the mother of the plaintiff as well as of the plaintiff; that, notwithstanding this knowledge and the recognition of plaintiff's tenancy, the zemindar, instead of proceeding against her and her sister, who had jointly inherited the property from their mother and were undoubtedly in possession thereof, had improperly and fraudulently brought the suit for rent against Braja Mohan, who had no connection whatever with the tenure after his sale; and that the decree thus obtained and the sale of the tenure in execution thereof, cannot and should not affect the rights of the plaintiff, who is entitled to recover possession as against both the zemindar and the purchaser.

It is contended by Baboo Mahesh Chandra Chowdhry that it matters not whether the zemindar knew of the purchase, or had recognized the plaintiff and her mother as his tenant; that it is of no consequence whatever whether the zemindar's acts were *bonâ fide* or not, or whether the proper person was sued or not; so long as the fact remains that the plaintiff has not paid the rent for this tenure for the year in question, and there was a decree against the tenure in execution of which the tenure was brought to sale, the plaintiff cannot succeed in this action. He argues that as long as it is not proved that the purchaser was a party to the fraud committed by the zemindar, his (the defendant's) purchase cannot be set aside. The decision in the case of *Jan Ali* v. *Jan Ali Chowdhry* (1) is quoted by the pleader in support of his argument. It is also contended with great force that the present suit not being a suit to set aside the decree or the sale on the ground of fraud, no inquiry should take place on those points, and as the decree and the sale still stand, the plaintiff can obtain no redress whatever. This contention appears

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to me to be wholly unsound. It must be admitted that the zemindar was not competent, at the expiration of the last day fixed for the payment of any one of the kists of his rent, to transfer the tenure of the plaintiff in this case to another by a mere fiat of his own; the tenure being admittedly a tenure of a hereditable and transferable character. The zemindar can only sue for the rent due to him, and after obtaining a decree for it, move the Court for a sale of the tenure. Now if he has to bring a suit in a Court of Justice, he must bring a proper and legal suit. In order to be a proper suit and a proper decree, the party really liable for the rent should be sued, and not a person whose interest and connection with the tenure has ceased to the knowledge of the zemindar. It appears to me clear that if the recognized tenant had not been sued, and no decree obtained in his presence and against him, the decree is not a decree any way binding either the tenant or the tenure. Consequently a sale in execution of such a decree will not affect the rights of the real tenants. The decision of *Jan Ali* v. *Jan Ali Chowdhry* (1) is not in point. In that case the decree was a proper and *bonâ fide* decree against the plaintiff, and when the sale took place that decree was standing against him. The Court held that notwithstanding the subsequent reversal of that decree by the higher Court, the sale should not be held invalid. Here the decree was not against the plaintiff, and no sale of the interests of the plaintiff had taken place.

The contention of the pleader, that a sale of a tenure under a decree under Act X of 1859 cannot be held invalid although the zemindar had sued and obtained a decree against a perfect stranger to the tenure, would not hold water for a minute, and if recognized and allowed as a valid contention would open the door to all sorts of fraud, and prove most prejudicial to all ryots and holders of under-tenures in this country.

It is said, why should the purchaser suffer for the fraud of the zemindar; it might also be asked why should the tenant lose his tenure. Between these two persons both innocent, Courts of

(1) 1 B. L. R., A. C., 56.

Equity are bound to see whose equity is greater. Is it equitable to hold that a man who was not called upon to pay his rent, who was not sued for it, and whose rights are not even pretended to be sold, should lose his tenure because the zemindar had acted fraudulently and obtained a decree against a wrong person quite unknown to him, merely because another innocent person has made the purchase and is to be deprived of the fruits of that purchase? Will it be justice to hold that the innocent tenant shall suffer from the fraud of the zemindar, but that the purchaser shall benefit by it? It seems to me that if we weigh the [respective] equities of these two individuals the equity of the plaintiff is far greater and weightier than that of the purchaser. The one is to lose what he is entitled to hold, and another is to acquire what is the property of the other.

It is then said that the proper remedy for the tenant is to sue the zemindar for damages; but why should the tenant lose his lands? He does not wish to get money, he wants his lands to be given to him. The purchaser, I apprehend, would be equally entitled to sue the zemindar for any deceit or fraud practised upon him, or for any *mispresentation; but on this point it is* not necessary that I should give any opinion.

A decision of this Bench (Loch and Mookerjee, JJ.) *Sadhan Chandra Bose* v. *Guru Charan Bose* (1) is cited to show that a zemindar is not bound to sue an alienor of his tenant, but, if no registration has been made in his sherista of the name of the purchaser, he can proceed to sue his registered tenant, and that his proceedings in such a case cannot be characterized as fraudulent. But this is a clear misapprehension of that case. What the Court distinctly held on that occasion was that there was no evidence that the zemindar had ever received rent from the purchaser, and there was nothing to show that the purchaser was recognized as a tenant by the zemindar. Of course if a zemindar has not recognized a purchaser as his tenant, or received any rent from him for the tenure, and there has been no mutation of the purchaser's name in his books, but he was wholly unaware of any transfer, the zemindar would be

(1) *Ante*, p. 6.

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solely guided by his books, and might be perfectly warranted in suing the tenant whose name appears on his record.

This is a suit more of the nature of a suit under the provisions of section 107 of Act X of 1859, than one founded on fraud. The only difference is that the plaintiff had not appeared before the Collecter; this omission is sufficiently accounted for and explained by the circumstances proved in this case that the plaintiff, a purda woman, had no intimation whatever either of the suit for arrears of rent or of the decree, which were both against Braja Mohan Deb. It has been held—and I think properly held—that an appearance before the Collector under section 106 is not a condition precedent to a suit in the Civil Court, but that a person who comes on the allegation contained in section 106 can at once come to the Civil Court and ask for redress. Now what will be the nature of the relief which that person would be entitled to if he is able to substantiate all the allegations that he is bound to prove under the aforesaid section? Is he not to get back his tenure if it had been taken possession of by the purchaser under the sale held by the Collector, or is he simply to be restricted to a suit for damages against the zemindar and nothing more? I apprehend that under the wording of the law, such a person would be entitled to get back his land wrongfully and unjustly sold at the instance of the zemindar, if he is able to establish his right by substantiating his allegations.

I am aware of no law that lays down that the tenure is hypothecated for the rent of it, and that the fact of the existence of an arrear is sufficient to deprive the holder of a transferable tenure of his holding, yet that is exactly the contention raised before us. The mere fact of an arrear having accrued and become due on the tenure would not, I apprehend, obviate the necessity of a suit against the tenant in possession for the rent, and of a decree against him.

I am therefore of opinion that the purchaser defendant has acquired nothing by the purchase, and that the plaintiff is entitled to recover possession of the property claimed by her.

The appeal will be dismissed with costs.

Appeal dismissed.